Notes and Comments

Loyalty Oaths

Within the past two years loyalty-oath programs from Arizona, New York, and Maryland[1] all marched their last mile to the Supreme Court; as expected, none returned. Last January a fourth program, also from New York,[2] endured a similar journey and lived to tell the tale; the reasons for its survival are far from apparent. In the first three decisions the Court, following earlier dispositions, articulated no single overriding objection that would invalidate all loyalty-oath programs, continuing instead to talk as though somewhere the perfect, the constitutionally invulnerable loyalty-oath program might exist. In the fourth case the Justices, in a summary affirmance, hinted that they had found what they were looking for. The result is a renewed confusion about what the Supreme Court's attitude toward oath systems really is, and a further proliferation of the doctrinal complexities that the Justices have been weaving around the loyalty-oath programs.

The essence of loyalty-oath programs is their self-executing character. The applicant for, or recipient of, some governmental benefit—most commonly public employment—confronts the option of pledging his fealty or foregoing the benefit. The details of operation may vary, but the attraction of loyalty-oath programs is their automatic operation: failure to take the oath entails, directly or indirectly, loss of position. When the piecemeal objections the Court has employed to invalidate loyalty oaths are unraveled and examined, however, the conclusion emerges that while a state can still, if it wants, attempt to administer oaths, it cannot achieve the self-executing feature that makes an oath program the cheapest, most easily administered and most insidious form of security program.

1. Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Whitehill v. Elkins, 389 U.S. 54 (1967).

2. Knight v. Board of Regents, 36 U.S.L.W. 3296 (U.S. Jan. 22, 1968), *aff'g mem.* 269 F. Supp. 339 (S.D.N.Y. 1967).

I.

Over the past century the Supreme Court has accumulated a raft of doctrinal devices to invalidate loyalty-oath programs. One set of arguments flirts with the blanket proposition that all loyalty oaths are unconstitutional; but the Court has never gone further than to hint at their existence. Another set deals only with flaws in particular oath systems; such tactics have allowed the Court to avoid wholesale overturnings of state and federal law, but at the cost of obfuscating whatever underlying constitutional objections there may be to loyalty-oath programs.

A. *Direct Attacks on Loyalty Oaths*

The Justices have suggested two rationales capable of invalidating all loyalty oaths. The first, based on the bill of attainder clauses, appeared in the Court's initial confrontation with the issue, re-emerged in the middle 1940's, and enjoyed a major revitalization in June, 1965. The second, derived from the "speech-action" analysis of the first amendment urged on the Court by two Justices for the last two decades, has never commanded the support of a majority.

1. *Bill of Attainder*

Cummings v. Missouri (1866)[3] involved the criminal prosecution of a Catholic priest who refused to execute the loyalty oath required by the 1865 Missouri Constitution. The oath required lawyers, doctors, ministers, and other professionals to deny by affidavit that they had ever, "by act or word," manifested a "desire for [the] triumph" of the nation's enemies or a "sympathy" with the rebels.[4] False swearing constituted perjury; serving without the oath was a criminal offense.

A sharply divided Supreme Court struck down the provision as a bill of attainder,[5] which was defined by Justice Field for the majority as any legislative act inflicting punishment without judicial trial. Punishment, in turn, meant "[t]he deprivation of any rights, civil or political, previously enjoyed, . . . the circumstances attending and the causes of the deprivation determining this fact."[6] The challenged law satisfied the test: it reached words as well as action, and the acts it sought to purge

3. 71 U.S. (4 Wall.) 277 (1866).
4. *Id.* at 279.
5. *Cummings* was decided before the enactment of the fourteenth amendment, so that the Court had no recourse to either first amendment or due process arguments.
6. *Id.* at 320.

bore no possible relation to fitness for the enumerated professions.[7]

The Supreme Court next relied on the bill of attainder provision some 80 years later, in *United States v. Lovett* (1946).[8] There the House Appropriations Committee had found three government employees guilty of "subversive activity," and Congress in the Urgent Deficiency Appropriation Act prohibited salary payments to them. The Court read the law as more than a mere fund cut-off remitting petitioners to a legal action for services rendered. Instead, the history of the statute revealed it to be a discharge and bar to re-employment based on a legislative judgment of the undesirability of petitioners' political beliefs. *Cummings* and its companion case, *Ex parte Garland,* demonstrated that "legislative acts, no matter what their form, that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial," were unconstitutional.[9] Here, said Mr. Justice Black for the majority, the direct naming plus the perpetual exclusion from government employment amounted to a bill of attainder.

However, resurrection of the attainder theory was shortlived. In *American Communications Association v. Douds* (1950),[10] the Court found that *Lovett* and its predecessors did not reach Section 9(h) of the National Labor Relations Act. That law required each officer of any union invoking the services of the Labor Board to file an affidavit swearing

> that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.[11]

The Court saw no difficulty in distinguishing Section 9(h) from the

7. *Id.* at 318. A companion case, *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866), challenged a federal statute requiring lawyers to swear that they had never voluntarily borne arms against the United States, held office in authority hostile to the United States, or "given . . . aid, countenance, counsel, or encouragement" to the rebels. Petitioner had been a member of the confederate Arkansas Senate, but had received a full pardon from the President. The law fell on the same grounds as had the Missouri provision: for those who could not take the oath, the statute "operate[d] as a legislative decree of perpetual exclusion," and such an exclusion "from any of the professions or any of the ordinary avocations of life for past conduct [could] be regarded in no other light than as punishment for such conduct." *Id.* at 377. Justice Field conceded a congressional power to regulate qualifications for public office, but, again, not as "a means for the infliction of punishment." *Id.* at 380.

8. 328 U.S. 303 (1946).

9. *Id.* at 315.

10. 339 U.S. 382 (1950).

11. *Id.* at 386.

laws earlier held invalid: "in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct,"[12] the fomenting of political strikes. That Congress had enacted no laws against political strikes was apparently immaterial.

The emphasis in *Douds* on the forward-looking operation of Section 9(h) suggested that a union could retain its NLRB affiliation and the officer his position merely by his resigning membership in the Communist Party.[13] To plug this loophole, the 1959 Landrum-Griffin Act replaced Section 9(h) with a new Section 504, providing that "no person who is *or has been* a member of the Communist Party . . . shall serve . . . as an officer . . . of any labor organization."[14] In *United States v. Brown* (1965)[15] the Supreme Court held the section a bill of attainder. *Douds* was nominally distinguished by its past-and-future-conduct reasoning, but actually eviscerated. In an argument as applicable to the old Section 9(h) as to its successor, Chief Justice Warren found Section 504 infected with "the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups."[16] The old statute may have entailed only a "loss of position," the Court said, but the new one, by its retroactive application, inflicted punishment. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive."[17] Moreover, by designating mere membership in the Communist Party as the proscribed status, rather than some activity as forbidden conduct, Congress had drawn an impermissible inference that "all members share [the] . . . evil purposes [of some] or participate in their illegal conduct"; at the same time, the legislature had "specif[ied] the people upon whom the sanction it prescribes is to be levied," thereby usurping the courts' adjudicative function.[18] As Mr. Justice White noted in dissent, the majority condemned the statute for both overinclusiveness in its indiscriminate lumping together of all Party members, and for

12. *Id.* at 413.
13. *Id.* at 414.
14. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 504 (1964) (emphasis added).
15. 381 U.S. 437 (1965).
16. *Id.* at 447.
17. *Id.* at 458.
18. *Id.* at 456, 461.

underinclusiveness in its omission of non-communist potential political strikers.[19]

2. *"Speech" vs. "Action"*

A second objection applicable to all loyalty oaths emerged during the 1950's from the dissenting opinions of Mr. Justice Douglas; it stood effectively as an application of the more general "absolutist" position formulated in first amendment cases by Justices Douglas and Black following the collapse of "clear and present danger" in the *Dennis* decision.[20] According to Justice Douglas in the loyalty-oath cases, the first amendment protected all belief, expression, and political association; the state could impose sanctions only for illegal conduct. Loyalty-oath programs sought to inflict punishment for beliefs or associations rather than conduct. In *Adler v. Board of Education* (1952),[21] Douglas dissented from the Court's upholding of the New York Feinberg Law. For him, the statutory procedure, under which a finding of membership in "subversive organizations" established a prima facie case for disqualification for public employment, rested on a principle of guilt by association.[22] The effect of such a procedure on the teachers to whom the Feinberg Law applied would be to inhibit the pursuit of truth, "which the First Amendment was designed to protect."[23] Justice Minton, speaking for the Court, was unimpressed: "From time immemorial, one's reputation has been determined in part by the company he keeps."[24] In reply, Justice Douglas protested that "the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy,

19. *Id.* at 464. On one occasion the Court circumvented the bill of attainder argument by holding that the government could affix reasonable qualifications to the granting of public employment. In Garner v. Board of Pub. Works, 341 U.S. 716 (1951), Los Angeles had adopted an ordinance denying public employment to anyone who within the preceding five years, was, or who thereafter should become, a member of, or affiliated with, any organization advising, advocating, or teaching the overthrow of the government by unlawful means. The city also required an affidavit from the employee, stating whether he was a member of the Communist Party. Mr. Justice Clark accepted *Lovett* as precedent, but found in the case before him reasonable relation of past conduct "to present and future trust." The attainder argument failed because the Court could find no imposition of punishment in "a general regulation which merely provides general standards of qualification and eligibility for employment." *Id.* at 722.

20. Dennis v. United States, 341 U.S. 494 (1951); *see* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 696-97 (1963).

21. 342 U.S. 485 (1952).

22. *Id.* at 508.

23. *Id.* at 511.

24. *Id.* at 493.

her social creed should not be the cause of reprisals against her."[25] Justice Minton promptly retreated to the "privilege" doctrine: "If [the teachers] do not choose to work on such terms," he said, "they are at liberty to retain their beliefs and associations and go elsewhere."[26]

The Court has advanced from *Adler*'s studied indifference to first amendment issues, but it has never brought itself to adopt the "speech-action" formulation urged on it by Justice Douglas. Indeed, its occasional efforts to deal with the first amendment issue in loyalty-oath cases have not been impressive. As early as *Cummings*, the Court had recognized that loyalty oaths inflict a punishment for disfavored belief; the bill of attainder clause was simply made to do service for a first amendment principle then inapplicable to the states.[27]

By the 1940's the first amendment applied to state action, but the Justices were no longer disposed to give it weighty consideration. In *In re Summers* (1945),[28] where Illinois denied a pacifist admission to the bar for his refusal to swear that he would serve in the Illinois militia, the Court concluded that the state had done no more than establish reasonable qualifications for the practice of law. Justice Black protested in vain that the state's action punished the petitioner's religious conviction "through the circuitous method of prescribing an oath, and then barring an applicant on the ground that his present belief might later prompt him" to violate his avowals in the highly unlikely event that he was called on to serve.[29] Five years later, the *Douds* Court was at least willing to admit the existence of a first amendment issue, but thought it outweighed in the balance by the national interest in sheltering interstate commerce from the evils of the political strike.[30] In *Garner v. Board of Public Works* (1951),[31] which followed a year later, Justice Clark dismissed the first amendment objections to the Los Angeles loyalty-oath program for public employees, as well as bill of attainder objections, by analogizing the municipality to a private employer and holding that the latter was as free as the former to consider the political beliefs of applicants in determining fitness for service. The same theory of public employment appeared in *Adler*, of course, where Justice Minton waved away the whole first amendment controversy with the

25. *Id.* at 511.
26. *Id.* at 492.
27. 71 U.S. (4 Wall.) at 318.
28. 325 U.S. 561 (1945).
29. *Id.* at 576.
30. 339 U.S. at 405.
31. 341 U.S. 716 (1951).

observation that working for the school system of New York is a privilege.[32]

B. *Indirect Attacks on Loyalty Oaths*

Over the same 100-year period, but largely in the later 1950's and early 1960's, the Court developed a variety of devices for disposing of individual oath provisions while stopping short of the ultimate question whether all loyalty laws were unconstitutional.

1. *Ex Post Facto Clause*

In *Cummings* and *Garland* the Court relied on an ex post facto argument to supplement the bill of attainder analysis. Although the challenged oaths themselves were not criminal laws within the rule of *Calder v. Bull*,[33] they imposed punishment for acts not criminal when committed.[34] The *Douds* Court reaffirmed the vitality of the early cases by stressing that Section 9(h) left union officers "free to serve . . . if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct . . . is not a bar to resumption of the position."[35] In *Garner* the Justices intimated that they would have found the city ordinance an ex post facto law but for the fortuity that the California state statute amending the Los Angeles charter had been passed seven years before the adoption of the ordinance—two years before the retroactive five-year period began to run.[36]

2. *Scienter Requirement*

Even while rejecting bill-of-attainder, first-amendment, and ex-post-facto arguments, the Court in the early 1950's foreshadowed its use of the knowing-conduct criterion it would later import into the Smith Act cases.[37] In the *Garner* decision Justice Clark interpreted the Los Angeles oath to require knowing membership in a proscribed organization. His assumption that "scienter is implicit in each clause of the oath"[38] lacked a basis in either the law or the state court opinions construing it, and drew heavy fire from the dissenting members of the Court.[39] The dubiety of the premise, though, indicated the *Garner*

32. 342 U.S. at 492.
33. 3 U.S. (3 Dall.) 385 (1798).
34. 71 U.S. (4 Wall.) at 327.
35. 339 U.S. at 414.
36. 341 U.S. at 721.
37. Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961).
38. 341 U.S. at 724.
39. *E.g.*, *id.* at 727 (Frankfurter, J.).

Court's feeling that deprivation of employment for innocent membership would require invalidation of the statute as a denial of due process. In *Adler* the Court reiterated its position, albeit peripherally, by noting that the New York courts had construed the statutory provisions involved to require knowing membership.[40]

The Oklahoma loyalty oath was the first to fall expressly for want of a scienter limit. In *Wieman v. Updegraff* (1952)[41] an Oklahoma state taxpayer sued to enjoin salary payments to public teachers and university staff members for their failure to take an oath, required of all state employees, disavowing (1) advocacy of revolution, sedition, or treason against the government, (2) teaching or justifying such advocacy, (3) membership in any organization advocating the overthrow of the government, (4) affiliation (direct or indirect) with the Communist Party or any group on the Attorney General's list, and (5) membership in a subversive organization within the preceding five years. Although the appellants' beliefs failed to raise a scienter objection, the Court concentrated on it in its opinion. Search though it might, the Court was unable to find scienter implicit in the act; consequently the "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."[42] Justice Clark, again writing for the majority, did not explain why the Oklahoma statute could not be said to contain a scienter element by the same judicial fiat that had characterized his *Garner* opinion the year before, and perhaps the *Wieman* decision is best understood as a display of growing judicial impatience with state security legislation.

3. *Due Process Right to Hearing*

Throughout the 1950's the Court consistently required a hearing where the public employee would have a right to explain why he had refused to take the oath, largely, it seemed, as a backstop to ensure compliance with the concurrently emerging *scienter* element. The *Garner* ordinance survived in part because the city had dismissed the petitioners only after an administrative proceeding on their refusal to sign the oath or execute the affidavit.[43] The *Adler* Court relied on the assurance of the state court below that the statutory presumption of non-employability arising from membership in an organization classi-

40. 342 U.S. at 494.
41. 344 U.S. 183 (1952).
42. 344 U.S. at 191.
43. 341 U.S. at 719.

fied as subversive was not conclusive, but operated only as an allocation of the production burden in a hearing where the employee had full opportunity to rebut it.[44]

The hearing requirement was determinative in *Slochower v. Board of Higher Education* (1956),[45] a case concerning security investigations rather than oaths. There a New York City ordinance required discharge from public employment whenever an employee invoked the privilege against self-incrimination to avoid answering questions relating to his official conduct. A divided Court reversed the summary dismissal of a professor who had taken the fifth amendment before a United States Senate committee; the state would have to determine whether Slochower's continued employment would conflict with any real public interest. Without a hearing the dismissal violated due process.

The first case involving the Washington state loyalty oaths reaffirmed the Court's position on hearings. Washington law required an oath of all public employees that they were not subversive persons, nor members of either the Communist Party or any subversive organization advocating, abetting, advising, or teaching overthrow, destruction, or alteration of the constitutional form of the federal or state governments, by revolution, force or violence. In *Nostrand v. Little* (1960)[46] the Court remanded a declaratory judgment suit for a state court determination whether a "hearing is afforded at which the employee can explain or defend his refusal to take the oath." Without such a hearing, the majority implied and the dissenting opinion asserted, the oaths would be unconstitutional.

By insisting on a right to hearing, the Court neatly destroyed an element central to all loyalty-oath schemes. Without the hearing requirement, the oath statutes were self-executing: a person refusing to take the oath simply did not qualify for a position; one swearing falsely could be prosecuted later for perjury. The due process hearing rule forced the state to assume the administrative burdens of operating a security program rather than relying on the automatic effect of a refusal to swear allegiance.

4. *Burden of Proof*

In *Speiser v. Randall* (1958)[47] the Court added another weapon to its due process armory against loyalty oaths. California had denied ap-

44. 342 U.S. at 495.
45. 350 U.S. 551 (1956).
46. 362 U.S. 474, 475 (1960).
47. 357 U.S. 513 (1958).

pellants a property-tax exemption granted veterans, because they refused to avow that they advocated neither overthrow of the government nor support of a foreign government against the United States in the event of hostilities. The statute placed the burden of proving nonadvocacy on the taxpayer, under a general provision requiring taxpayers to show entitlement to a deduction or benefit. Taking the oath satisfied the burden. If the taxpayer refused to take the oath, he could attempt to prove his innocence at a hearing, where he assumed the burden of proof.

The Supreme Court held the procedure unconstitutional. While the state could, of course, allocate burdens of proof generally, it could not, said Mr. Justice Brennan, shift the burden in a manner offensive to fundamental concepts of justice. The Constitution forbade the state to "declare an individual guilty or presumptively guilty of a crime" in a situation where first amendment interests were at stake.[48] Throwing the burden of persuasion on the taxpayer would have a chilling effect on free speech: "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."[49]

5. *The Void-for-Vagueness and Overbreadth Doctrine*

The next step in the extension of due process to loyalty oaths came with the application of the vagueness doctrine. In *Douds* the Court had rejected a vagueness objection to Section 9(h) because the statute's requirement of willful false swearing effectively restricted punishment to acts done with knowledge of their illegality.[50] Chief Justice Vinson did not explain how a specific intent to do what the act forbade could clarify the meaning of a statute that might otherwise be unconstitutionally vague.

In *Cramp v. Board of Public Instruction* (1961),[51] the Court invalidated a state loyalty oath for the first time on the ground that an affiant could not know what he was swearing to. Besides the usual disclaimer that the swearer did not believe in the violent overthrow of the government, the Florida statute required an avowal that the affiant "has never lent his 'aid, support, advice, counsel or influence to the Com-

48. *Id.* at 524.
49. *Id.* at 526.
50. 339 U.S. at 413.
51. 368 U.S. 278 (1961).

munist Party.' "[52] Appellant argued that the language was so uncertain that it put him in fear of prosecution for false swearing if he did sign, but his affidavit denying Communist Party membership and asserting his loyalty made the threat of injury so remote as to virtually eliminate his standing to sue. In the Supreme Court, the majority found an argument from vagueness all that appellant had left, but that this issue was more than sufficient to confer capacity to sue. Despite the Florida courts' gloss importing a *scienter* limit, the Court held the act unconstitutional. What did it mean to swear that one had never knowingly lent his "aid," "support," "advice," "counsel," or "influence" to the Communist Party? What if he had voted for a Communist Party candidate, or defended the constitutional rights of a communist? "Indeed," Mr. Justice Stewart asked, "could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?"[53] The Court held that the oath was lacking in terms susceptible to objective measurement, and that it was so ambiguous as to encompass "guiltless knowing behavior."[54]

Still, the fact that the Florida act, absent any restrictive judicial construction on its face, reached conduct which the state could not constitutionally punish, showed the real objection to the statute to be not its vagueness, but its overly broad sweep into clearly protected activities. The vagueness argument served as the vehicle for the first amendment issue in the case, which Stewart added almost as afterthought: "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."[55]

Three years after *Cramp*, in *Baggett v. Bullitt* (1964),[56] both the overbreadth and free speech arguments underlying the vagueness approach emerged more clearly. In *Baggett* the Court finally considered the Washington state oath system it had refused to pass on in the *Nostrand* case. A 1931 oath required all teachers employed by the state to swear to "promote respect for the flag and the institutions of the United States . . . and . . . reverence for law and order and undivided allegiance to the government"; a 1955 oath required all state employees to swear that they were not members of the Communist Party or any subversive

52. *Id.* at 279.
53. *Id.* at 286.
54. *Id.*
55. *Id.* at 287.
56. 377 U.S. 360 (1964).

organization, and that they did not advise, teach or abet those who would overthrow the government by force.[57] Both branches fell before a vagueness-broadness attack. The 1955 oath was not susceptible of objective measurement, and could subject guiltless knowing behavior to criminal penalties for false swearing; the 1931 oath was invalidated because it inhibited professors from criticizing social institutions, and alternatively because it, like the 1955 oath, was offensive to due process for its vagueness. The honest and law-abiding oath-taker might steer far wider of the unlawful zone than if the boundaries of the proscribed area were clearly demarcated. The vice of the statutory scheme was its inhibiting effect on the criticism, expression, and association of "[t]hose with a conscientious regard for what they solemnly swear."[58]

For the cases where the statutory language was really too clear for the Justices to resort to the argument that they were unable to fathom the meaning of the legislature, the vagueness doctrine generated a concomitant "overbreadth" test. The notion that a statute could sweep with unconstitutional breadth across the range of protected activity underlay the parade of horribles in *Cramp* and emerged as an alternate ground in *Baggett*.[59] As far back as the *Garner* case, the Court had hinted at the overbreadth argument by importing a *scienter* limit to the statute. In *Wieman* the statutory complex had given the Court an ample opportunity to sharpen its vagueness hatchet, but it had opted instead for the overbreadth reasoning. As with *Douds*, the dividing line separating the activities the state could deter from those it could not lay along a *scienter* line: an "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power," said Justice Clark for the majority, and the statute did not permit the Court to insert the necessary distinction itself.[60]

6. *Balancing and "Academic Freedom"*

Justices Black and Douglas, dissenting in the *Adler* case, were the first to suggest that academic freedom might deserve additional consideration because of its importance to first amendment liberties. In *Sweezy v. New Hampshire* (1957)[61]—a security investigation case—Mr. Justice Frankfurter delivered a major statement on the importance of educational liberty to social betterment. Sweezy had been cited for

57. *Id.* at 362.
58. *Id.* at 372.
59. 377 U.S. at 372.
60. 344 U.S. at 191.
61. 354 U.S. 234 (1957).

contempt after he had refused, on first amendment grounds, to answer questions put to him by the New Hampshire attorney general about a lecture he had given at the state university. The majority looked longingly at the ultimate considerations of political and academic freedom in the case, but rested its reversal of the decision below on the narrow ground that the legislature, in authorizing the attorney general to conduct his investigations, had not indicated with sufficient clarity what sort of information it wanted him to turn up.[62] In a concurring opinion Frankfurter argued that the Court's task was to reach "a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection."[63] A free society, Frankfurter continued, depended on free universities, and he quoted lengthily from various sources to demonstrate the historical roots of his contention.[64] After assigning academic freedom such a heavy weight on the scales, Frankfurter found the "shadowy threat to security" posed by the petitioner too "meagre a countervailing interest" to warrant encroachment on his personal rights.[65]

Subsequent opinions, however, indicated that the balancing approach to loyalty programs might be a sometime thing. In *Shelton v. Tucker* (1960)[66] Frankfurter again put the competing interests of security and academic freedom on the scales, but this time the "personal rights" emphasized in *Sweezy* lost a good deal of weight. *Shelton* concerned an Arkansas statute requiring every teacher in a state-supported school to file an annual affidavit listing all organizations he had belonged to or regularly contributed to within the past five years. The Court did not deny that the state had a legitimate interest in the activities of its teachers, but thought that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." The majority pointed out what Frankfurter had argued in *Sweezy*: "The viligant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[67] Frankfurter dissented, arguing that organizational connections, unlike "wholly individual interests,"

62. *Id.* at 254.
63. *Id.* at 266-67.
64. *Id.* at 262-63.
65. *Id.* at 265.
66. 364 U.S. 479 (1960).
67. *Id.* at 485-87.

gave rise to any number of conceivable reasons for public investigation. For example, the state might want to know whether the teacher had overburdened himself with outside obligations.[68]

Frankfurter's opinions in *Sweezy* and *Shelton* exemplified the pitfalls in the ad hoc balancing theory of the first amendment and raised serious questions about the value of "academic freedom" as a technique for handling the loyalty-oath problem. Academic freedom, when it counted for anything at all in the Court's opinions, came in as an additional weight on the first amendment side of the scales. But a factor which could appear and disappear with such erratic ease was plainly unable to deal fully with the loyalty-oath question.

II.

The latest Supreme Court opinions display more an agglomeration of the doctrinal devices accumulating over the years than a reasoned selection from among them. *Elfbrandt v. Russell* (1966)[69] presented a challenge to the Arizona oath system, which required affiants to swear support to the state and federal constitutions, to defend the government from its enemies, to bear true faith and allegiance, and to discharge the duties of their offices. The statute punished false swearing by both discharge from employment and criminal prosecution; but a legislative gloss limited the false-swearing provision to cases where an officer at the time of taking the oath or thereafter knowingly or willfully overthrew or aided in the overthrow of the government, or advocated overthrow by force or violence, or knowingly became a member of the Communist Party or one of its subordinate organizations with knowledge of its unlawful purpose.[70] Arizona had obviously designed the oath, which was adopted only after the Supreme Court decision in *Baggett*, to meet the objections the Court had voiced in its various decisions: the new law was not ex post facto; it did not punish innocent knowing membership; it was not particularly vague.

The Justices were unimpressed. Douglas, speaking for the majority, drew on all the available arguments. The limitation to "mere knowing membership" might be an improvement on past legislative efforts, but it still was not good enough: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organiza-

68. *Id.* at 494-95.
69. 384 U.S. 11 (1966).
70. *Id.* at 12-13.

tion infringes unnecessarily on protected freedoms."[71] Because the statute could apply to one who joined an organization conducting illegal activities which the member neither engaged in nor intended to engage in, the law "impose[d], in effect, a conclusive presumption that the member shares the unlawful aims of the organization."[72] The scheme posed an undue threat to first amendment freedoms; it swept overbroadly across cherished liberties; it proceeded on the constitutionally impermissible doctrine of "guilt by association."[73] Finally, the law lacked any procedure for an administrative hearing prior to dismissal.

Elfbrandt, more than any decision before it, reflected the essentially homologous nature of all the doctrinal devices circulating through the opinions. Consider, for example, the rule against "guilt by association" as announced by Justice Douglas. The proscription applied because the oath with its accompanying gloss could punish knowing but guiltless behavior. But while "guilt by association" included as one facet the problem of punishment for innocent conduct, the doctrine could arise as well from vagueness-overbreadth considerations. Alternatively, the Court could have relied on the bill-of-attainder argument in *Brown* to reach the same result by changing the language but not the substance of the analysis. "Guilt by association" was also found in the fact that the statute was not limited to those with the requisite specific intent, from which, said the *Elfbrandt* Court, "[t]he unconstitutionality of [the] Act follows *a fortiori* from *Speiser v. Randall*."[74] *Speiser* gave "guilt by association" a basis in the due process objection to a presumption of guilt that the employee had the burden of rebutting. And finally, the guilt-by-association doctrine arose from the first amendment guaranty protecting the right of association and permitting the punishment only of conduct.[75] *Elfbrandt*, in short, left little of guilt by association as an independent objection to loyalty oaths; it tended to collapse the doctrine to a merely rhetorical formulation of each of the underlying objections the Court had previously advanced.

In *Keyishian v. Board of Regents* (1967),[76] the Justices passed again on the New York Feinberg program they had upheld in the *Adler* decision. During the fifteen intervening years the state had implemented

71. *Id.* at 19.
72. *Id.* at 17.
73. *Id.* at 19.
74. *Id.* at 17.
75. *Id.* at 18.
76. 385 U.S. 589 (1967).

an impressively complex statutory scheme.[77] Section 105 of the Civil Service Law prohibited the appointment to office of anyone (a) who wilfully and deliberately advocated, advised, or taught the overthrow of the government by force, violence, or unlawful means; or (b) who printed or published any writing advocating, advising, or teaching such and who advocated, advised, taught, or embraced the duty, necessity, or propriety of adopting the doctrine contained therein; or (c) who organized or helped organize or became a member of a group teaching or advocating forcible overthrow. The Section also made membership in the Communist Party prima facie evidence of disqualification; but disqualification entitled the aggrieved party to petition for a hearing. The utterance of any treasonable or seditious word or the commission of any treasonable or seditious act while holding a state position, constituted ground for removal from office. A treasonable word or deed was defined as "treason" within the New York Penal Law; a seditious word or deed, as "criminal anarchy."

Additional provisions in the Education Law applied exclusively to public school employees. Section 3021 reiterated the Section 105 removability for utterance or commission of seditious or treasonable word or act, without, however, incorporating the Penal Law definitions. Section 3022 required the State Board of Regents to establish a program for disqualifying personnel under Sections 105 and 3021, and to list all Section 105 organizations (drawing on federal agencies for whatever help it might need), with the prima-facie-evidence consequences for members prescribed in Section 105. The Regents promulgated appropriate regulations under the statute, among them the requirement, first, that teachers sign a certificate denying present Communist Party membership and affirming notice to the State University President in the event of past membership; and second, that non-teaching school personnel file a written answer to the question whether they had ever advised or taught, or been a member of a group teaching or advocating forcible overthrow of the government.

One group of appellants, professors at a state university, refused to sign the certificates; each was notified that failure to sign would result in dismissal. Another appellant, a non-faculty employee, refused to file the written answer required; he was fired. They all brought suit for declaratory and injunctive relief. Just before trial the Regents rescinded the certificate requirement and announced that refusal to sign would

77. The relevant statutory provision and the Regents' regulations are printed as an appendix to the opinion, 385 U.S. at 610-20.

no longer automatically constitute grounds for dismissal. In place of the certificate the Regents instituted a personal interview for cases where the applicant was uncertain whether he was qualified under the statutes, and in which refusal to answer relevant questions of the hiring officer would be sufficient ground to refuse an appointment. "A prospective appointee who does not believe himself disqualified need take no affirmative action," said the brochure. "No disclaimer oath is required."[78]

The abandonment of the Feinberg Certificate might have been thought to render the whole case academic, so to speak. The Court disagreed. "The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign," wrote Mr. Justice Brennan for the majority. "The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application."[79] That may have been the claim, but the fact was that removal of the certificate eliminated any threat of application of the *oath* system. The change in procedure meant that New York had substituted a security investigation program for its oath statute so far as public teachers were concerned, a fact that left appellants with little more than an attack on the constitutionality of the new state security scheme on its face. That made the *Adler* precedent irrelevant, since that case had merely sustained a different oath system now abandoned by the Regents. The Court however, chose to view *Adler* as pertinent but distinguishable. Since some parts of the statute were not in existence when *Adler* was decided, and since some challenges had not been properly raised, a portion at least of the complaint was salvageable: *Adler* could not foreclose the appellants' contention that Sections 3021 and 105 were void for vagueness.[80] The procedural hurdles thus tipped over, the Court proceeded to pass on the merits, applying the standard arguments formerly reserved for loyalty oaths to the New York investigation program, and apparently oblivious to the fact that rescission of the oath had shifted the burden of the whole statutory scheme from the employee to the state.

Justice Brennan first considered the sedition-treason provisions, and found them undefinable. To be sure, Sections 105 and 3021 tracked one another, and the former incorporated the Penal Law definitions for

78. *Id.* at 596.
79. *Id.*
80. *Id.* at 595.

"treason" and "criminal anarchy." But the Court could find no similar incorporation for Section 3021, and even if it could have, one look at the Penal Law convinced it that the Section 105 incorporation had only made matters worse. The majority could discern "virtually no limit" to the possible scope of the term "seditious."[81] Would carrying the *Communist Manifesto* on the street be seditious? Did the statute prohibit abstract "advocacy" of seditious doctrine? Did the teacher "who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?"[82] For the majority the questions were unanswerable under the law as written. As a result of the vagueness, "no teacher can know just where the line is drawn between 'seditious' and nonseditious utterance and acts."[83]

As for the advocacy and distribution provisions of Section 105, they fell for much the same reason: their vagueness and overbreadth made them "highly efficient *in terrorem* mechanism[s]" for the deterrence of "that free play of the spirit which all teachers ought especially to cultivate and practice . . . ."[84] Finally, taken as a whole, the statutory scheme suffered from an overriding vagueness difficulty: it was impossible to understand. New York had created a "regulatory maze," whose ambiguity of wording was "aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."[85]

While Section 3021 fell because of its vagueness and overbreadth, Sections 3022 and 105 were unconstitutional because they were too specific, at least insofar as they prohibited members of the Communist Party from qualifying for state employment. In invalidating these provisions, the majority relied primarily on *Elfbrandt*, holding that any sanctions based on a mere showing of knowing membership, without a further demonstration of specific intent to carry out the illegal aims of the organization, would rest on a doctrine of guilt by association repugnant to the Constitution.[86] The "specific intent" requirement effectively meant that the state must prove each teacher refusing to take the oath guilty of unlawful conduct other than the refusal. *Speiser v. Randall* would of course apply to prevent the state from creating a pre-

81. *Id.* at 599.
82. *Id.* at 600.
83. *Id.* at 599.
84. *Id.* at 601.
85. *Id.* at 604.
86. *Id.* at 606.

sumption of such conduct at the hearing, and so placing on the employee the burden of proving his innocence.[87]

The New York law thus fell because the *Keyishian* Court insisted on treating the security investigation program like a loyalty oath. The program had operated as such, when petitioners initiated suit, but dropping the certificate had eliminated the self-executing characteristics central to the concept of a loyalty-oath system. In one breath the Court reiterated that the state had a legitimate interest in protecting its educational system from subversion—the familiar incantation before the sacrifice—and in the next invalidated just such a non-oath program, the application of which was not before the Justices.

While the *Keyishian* Court relied on a vague loyalty oath no longer in existence to invalidate the New York security investigation program, a six-man majority in the next case, from Maryland, reasoned from a security investigation program not even at issue in the litigation to invalidate the loyalty oath before it. In *Whitehill v. Elkins*,[88] decided last November, Maryland required all state employees to swear that they were "not engaged in one way or another in the attempt to overthrow the Government of the United States . . . ."[89] The petitioner, applying for a teaching position at the state university, sued for a declaratory judgment that the oath was unconstitutional. The Court, speaking through Justice Douglas, held that the pledge must be read in conjunction with the Ober Act,[90] under which the state Board of Regents and the attorney general had promulgated the oath. The oath itself was not a part of the Act, nor did it look to the Act as a referent in defining its own terms. The Court did not suggest that the oath standing by itself was void for vagueness. But the Ober Act was vague, and so the oath fell. The act was vague because it was broad; it was broad because it lacked a *scienter* limit; and the absence of *scienter* was fatal for the consequent chilling effect upon "conscientious teachers." Sections 1 and 13 of the Act reached those who would "alter" the form of government "by revolution, force, or violence," and those who were members of a subversive organization or a foreign subversive organization. The Court found itself "beset with difficulties":

Would a member of a group that was out to overthrow the Gov-

87. *See* pp. 747-48 *supra*.
88. 389 U.S. 54 (1967).
89. *Id.* at 55.
90. Md. Ann. Code Art. 85A (1957).

> ernment by force or violence be engaged in that attempt "in one way or another" within the meaning of the oath, even though he was ignorant of the real aims of the group and wholly innocent of any illicit purpose? We do not know; nor could a prospective employee know, save as he risked a prosecution for perjury.[91]

It is difficult to resist the conclusion that the Court's "difficulties" were self-manufactured, especially since the Maryland courts had construed the same provisions of the Ober Act to require proof that an individual applicant "advocate" overthrow by force and violence before the state could disqualify him from employment.[92] That, however, was not enough. According to Justice Douglas, the alteration and membership clauses were still "befogged." The Act lacked the "[p]recision and clarity" essential to avoid deterring "the flowering of academic freedom . . . ."[93]

The triviality of the *Whitehill* argument is reflected in its result: the Maryland legislature could resurrect the oath simply by re-enacting it, word for word, or by reauthorizing its promulgation. Indeed, given the severability clause in the Ober Act—which the Court did not suggest is unconstitutional—and the consequent validity of the authorizing and delegating provisions, the attorney general may reinstitute the exact oath that the Court has overthrown for vagueness.[94]

The latest case in the series came down January 22, 1968. *Knight v. Board of Regents*[95] involved an aspect of the New York Education Law not passed on in *Keyishian*. In pertinent part Section 3002 of the Education Law provided:

> It shall be unlawful for any citizen of the United States to serve as teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university or other educational institution in this state, whose real property . . . is exempt from taxation . . . unless and until he or she shall have taken and subscribed the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of ————————, . . . to which I am now assigned.[96]

91. 389 U.S. at 59.
92. Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950).
93. 389 U.S. at 62.
94. MD. ANN. CODE Art. 85A § 18 (1957).
95. 36 U.S.L.W. 3296 (U.S. Jan. 22, 1967), *aff'g mem.* 269 F. Supp. 339 (S.D.N.Y. 1967).
96. N.Y. EDUC. LAW § 3002 (McKinney 1953).

Twenty-seven faculty members at Adelphi University (a private, nonprofit, tax-exempt school) refused to execute the oath, and brought suit to enjoin its enforcement in the federal district court. In June, 1967, a three-judge panel unanimously upheld the validity of the statute.[97] On direct appeal, the Supreme Court affirmed, without opinion, thus ratifying if not adopting what the lower court had said. An appraisal of the significance of the Supreme Court's decision accordingly requires an examination of the opinion below.

The results of that examination are not encouraging. To begin with, the case arose on perhaps the most ambiguous record to grace the Supreme Court's files since the celebrated *Adler* litigation of 16 years before. The ambiguity was attributable to legal mismanagement rather than statutory desuetude; Adelphi officials had inadvertently overlooked the Section 3002 requirement ever since it was first enacted in 1934, and the Board of Regents seems to have been equally remiss. Apparently nobody was sure even how to enforce the law: the court was unable to say whether a refusal to sign the oath would lead to prosecution of the teachers, prosecution of the school, suspension of the latter's tax exemption, or some combination of the three.[98]

Judge Tyler, writing for the court, placed primary reliance on what he termed the "affirmative" character of the oath. Its first branch merely paralleled the customary pledge of allegiance intoned by state legislators on taking office; the second amounted only to a request by the state that private-school teachers subscribe to professional competence and dedication in consideration for their institution's tax-exempt status.

The argument had a surface appeal, but not much more than that. As for the section of the oath requiring a pledge of allegiance, the court offered only the dictum from *Bond v. Floyd*[99] that an oath requirement for state legislators does not infringe upon their first amendment rights. Private-school teachers are not state legislators, however, and a court so inclined might have examined the unquestioned differences between them.

The plaintiffs' first argument was that exacting an affirmative expression of loyalty from a teacher violated the rule in *West Virginia State*

97. Knight v. Board of Regents 269 F. Supp. 339 (S.D.N.Y. 1967).
98. The first part of Section 3002 makes it unlawful for a citizen to teach in an institution that has a tax exemption unless and until he has taken the oath. The second prohibits an officer of such an institution from hiring someone who will not take the oath.
99. 385 U.S. 116, 132 (1966).

Board of Education v. Barnette;[100] but that case, said the court, was clearly distinguishable, first, because the pledge there was "far more elaborate" than the affirmation required by New York, and second, because the decision in *Barnette* rested solely on the first amendment guaranty of religious freedom. The court did not explain the relevance of "elaborateness" as a test of virtue for loyalty oaths, nor did it suggest why Justice Jackson's language placing the *Barnette* decision on a broader base than religious freedom should be ignored.[101]

Plaintiffs next contended that the affirmative-oath aspect of the statutory requirement was unconstitutionally vague. The court disagreed. *Baggett, Keyishian, Elfbrandt,* and *Cramp* were all different cases, said Judge Tyler, because there the oaths were "negative" and "such oaths . . . typically require an affiant to state that he is not now and has never been a member of certain organizations. . . ."[102] The court's definition of negative loyalty oaths suggested that the judges thought them invalid as ex post facto laws, while the affirmative oath now before them looked only to the future. But the oaths in *Baggett* and *Elfbrandt* were not ex post facto, and did not go to past membership or conduct.[103] Judge Tyler also seemingly suggested that requiring a mere expression of loyalty to the Government made a constitutional difference. Other courts had not thought the distinction between positive and negative oaths so persuasive. The Supreme Court, for example, invalidated the 1931 Washington state oath in *Baggett v. Bullitt*[104] that

100. 319 U.S. 624 (1943).

101. 269 F. Supp. at 340-41. The plaintiffs in *Barnette*, were, according to Judge Tyler, "members of a religious group who claimed that the requirement of the oath and accompanying salute violated their religious beliefs." *Id.* at 341. That reading of the *Barnette* case fails to deal with statements in the opinion thought to be hallmarks in the Supreme Court's articulation of a general first amendment right *not* to speak:

> The question which underlies the flag salute controversy [wrote Justice Jackson for the majority] is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.
>
> . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters or opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. at 635, 642. Evidently the three-judge court had thought of one. Its suggestion that the principles of the *Barnette* case are now invocable only by those with a *religious* objection to compelled utterance is a disturbing one, and the Supreme Court's affirmance, however summary, does nothing to ease the sense of discomfort generated by Judge Tyler's opinion.

102. 269 F. Supp. at 341.

103. *Cramp* did look to past actions, requiring the teacher to swear "I *have not* and will not lend my aid. . . ." 368 U.S. at 279 (emphasis added). In *Keyishian* the statutes did not refer to past conduct, 385 U.S. at 610-20, but the Regents' regulations provided that past conduct could be investigated and was relevant to qualification.

104. 377 U.S. 360 (1964).

required teachers to swear "to promote respect for the flag and institutions of the United States . . . and . . . reverence for law and order and undivided allegiance to the government"; the Washington language may not have been identical to a pledge of allegiance, and it may have amounted to a promise to do good as well as to be loyal, but the Supreme Court had still thrown it out on the ground that it effectively inhibited professors from criticizing social institutions.

As a last argument, plaintiffs urged the three-judge court to recognize the preferred status accorded teachers by the Supreme Court in the loyalty-oath cases. The *Knight* court declined. "We interpret the statute," it said, "to impose no restrictions upon political or philosophical expressions by teachers. . . ."[105] Again there was no attempt to reconcile that decision with the holding in *Baggett.*

The three-judge court concluded:

> A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach, nor does it restrict its teachers by encouraging them to uphold the highest standards of their chosen profession. Indeed, it is plain that a state has a clear interest in assuring "***careful and discriminating selection of teachers" by its publicly supported educational institutions.[106]

It is difficult to know what to make of that argument. The notion that the oath system simply attached a permissible condition to the opportunity to teach virtually restated the now discarded "privilege" doctrine. The suggestion that the New York statute merely "encouraged" teachers to uphold their professional standards treated rather cavalierly the criminal penalties apparently following upon a disinclination at the employer level to be "encouraged"; and the idea that the state can "carefully discriminate" among the teachers that a private school may hire, on the basis of their willingness to swear their loyalty to the state and federal governments, should have attracted a few raised eyebrows in the Supreme Court.

Judge Tyler's *Knight* opinion is all the more puzzling for the things it does not say. Specifically, what has happened to *Speiser v. Randall*?[107] It is not clear in *Knight* that Section 3002 entitles either the school or the teachers to a due-process hearing at all. Nothing in the record suggests who has the burden of proof at the hearing, assuming there is

105. 269 F. Supp. at 341.
106. *Id.* at 341-42.
107. 357 U.S. 513 (1958).

one. It is no answer to say that the state will have the burden of proving the offense at a criminal prosecution of the school for continuing non-affiants in its employ: first, the state may conceivably deny the tax exemption instead, and even if it does proceed by criminal charges, it proves its case by showing the mere fact that teachers have not signed.

The Supreme Court's summary affirmance is a mystifying disposition of the case. It would be consoling to think that a decision without opinion is like a denial of certiorari or dismissal of an appeal—signifying nothing, and without precedential significance. But a summary affirmance is an affirmance still, and an appraisal of the decision's impact on the prior case law is no less necessary because the Justices thought it superfluous or unwise to explain their action. Even before *Knight* the *Elfbrandt-Keyishian-Whitehill* trilogy had demonstrated the risks inherent in attempting a summation; the latest decision deprives us even of the comforts in Mr. Justice Harlan's caustic *Whitehill* observation that "The only thing that does shine through the opinion of the majority is that its members do not like loyalty oaths."[108]

III.

Elfbrandt, Keyishian, and *Whitehill* bring no new analysis to bear on the loyalty-oath question. At best the three cases merely weave the principles of the earlier decisions. Such a procedure is not always illuminating, and it is not unfair to say that the three decisions are more noteworthy for their welter of quotations than for the clarity of their reasoning. The principles articulated—and they are many—either subtly evade the ultimate issues involved, or deal narrowly with the precise question presented, or are so general and sweeping that they are best characterized as emotive rather than cognitive.

Indeed, all the arguments the Court has offered begin to look more like one another the more closely they are examined. The decisions in *Cummings, Lovett,* and *Brown,* for instance, leave the reader with the impression that the laws there invalidated really fell as bills of attainder because they offended the due-process notion later crystallized as the overbreadth doctrine. *Cramp* and *Baggett* speak of the due process objections to undue ambiguity and sweep, but they focus on the first amendment values of thought and association. *Wieman* looks to the unfairness of classifying the knowing with the innocent in a way that

108. 389 U.S. at 63.

reflects, if it does not duplicate, the reasoning of the bill of attainder cases. *Elfbrandt* offers "guilt by association" as a theme amenable to explanation under any one of the above rationales. *Keyishian* relies on all the arguments to strike down a loyalty-oath program that turns out to be no loyalty oath program at all. *Whitehill* stands as a vagueness decision looking aimlessly about for a place to happen.

Knight, on the other hand, is perhaps best viewed as a trial balloon, sensing out reaction to a distinction along "affirmative-negative" lines. It may of course be something else: it may be a dispositive conclusion of the issue; it may be an embarrassed acknowledgment that the Court cannot gird itself to invalidate an oath whose words the Constitution itself requires the President to recite at his inauguration, in which case it is as definitive a statement of the law as we are likely to get; it could even be a mistake. But seen as a tentative proposal for differentiating good from bad oaths systems, it offers a solution that should be speedily retired.

A narrow decision, restricted to the perhaps innocuous wording of Section 3002, might have allowed the Court to avoid the appearance of pushing logic to its wooden extreme. And such a decision may have been all the Court intended. But its summary affirmance, with the suggestion that an "affirmative-negative" distinction may be viable, ominously resembles a thirteenth chime of the grandfather clock: not only is it inappropriate but it also calls into question the validity of the preceding twelve. The "affirmative" oath as a generic category is no less insulting and dangerous than its "negative" counterpart. Both presuppose that one not signing the oath does not support the government, and therefore does not merit a governmental benefit. Both designate a class of citizens as guilty of disloyal conduct until each member of the class establishes his innocence by swearing to his proper beliefs—in *Knight*, "true faith and allegiance." The New York statute involved in *Knight* displayed the vices of a classic loyalty-oath program: its enforcement procedures were so uncertain that not even the court could be sure what they were; and on its face it held the institutional employer guilty of a misdemeanor—assuming such was the applicable penalty—simply on the school's retention of a teacher who refused to execute the oath, without opportunity by either employer or employee to justify the refusal.

Even more seriously, the *Knight* decision holds out the prospect that every "negative" loyalty oath—including the ones the Court has invalidated—may rise again in a new, constitutionally approved, "affirmative" aspect. A state so inclined could define "allegiance" to the govern-

ment in just the terms of nonsubversive status and non-Communist Party membership that fell in the cases up to *Knight*. No one can be sure, for instance, that in enforcing the newly revitalized Section 3002, the New York Board of Regents will not define the elements of either the "affirmative-oath" or "professionalism" branch in precisely the terms that the Supreme Court found impermissibly vague in the *Keyishian* litigation. Even if the Court pierces through the "affirmative" surface of such a statute to reach its "negative" underpinnings, the *Knight* decision will have only precipated another round of litigation just like the one everybody had thought was finished with *Whitehill*.

The better approach, then, is an abandonment of the *Knight* suggestions and a return to the relative stability of the three preceding cases. Even there the Court has left a confusion and duplication of doctrine. But it has already erected a barrier sufficient, with only moderate fortification, to deny all loyalty-oath programs their self-executing character. The purpose of any oath program is to create a procedure that operates automatically to deny the public benefit in question upon a refusal to swear fealty. If the state must amass its own evidence to show that the applicant or recipient is unsuitable for, say, public employment, the state has not an oath system but a security investigation program. Such a program lacks the ease of administration of an oath system; it also lacks the most insolent feature of an oath system, the presumption that anyone who will not swear to his loyalty is in fact not loyal.[109]

The case law makes clear that an oath system may not constitutionally operate automatically: even after refusing to take a required oath, the job-holder must be offered a hearing. Moreover, *Speiser v. Randall* shows that at the hearing the state must bear the burden of showing the person's disloyalty, or at any rate that he is a security risk of defined magnitude.[110] But *Speiser* deals inadequately with the question of what burden the state must bear and how it may meet the burden. While *Speiser* shifts both the *production* burden—the responsibility for initial presentation of fact—and the *persuasion* burden—the responsibility for convincing the trier of fact—to the state, it fails to indicate how substantial the production burden must be. If the opinion is read

109. Justice Field, in *Cummings*, stated the personal objection to oaths generally after he had found the one before him to be unconstitutional:

> The clauses in question subvert the presumption of innocence, and alter the rules of evidence . . . . They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

71 U.S. at 328.

110. 357 U.S. at 525-26.

narrowly to permit the state to satisfy its production burden simply by submitting the fact of the employee's refusal to take the oath, then the law may be in the position of the famous French king. It has marched up the hill with lofty purpose by requiring a hearing before dismissal; it has walked down by placing the employee back very nearly where he started—after the state introduces his refusal as evidence, he must introduce evidence of his innocence or risk a finding by the trier of fact that the state has met its burden of persuasion. The employee will be under strong pressure, at the very least, to perform the functional equivalent of an oath-swearing by denying his guilt.

If *Speiser* is to be at all effective, it must be read to do more. To prohibit such a circumvention of the due-process rule that the decision establishes, the case should be taken to impose a stiffer burden of production on the state; *Speiser* should require the state to introduce some evidence of the misconduct prohibited by the oath, independent of the mere refusal to sign the oath. Whether a refusal to sign may properly constitute evidence of misconduct is another question, and one for which *Speiser* contains no answer. Even without delineating the inferences that may follow from refusal, however, by stiffening the state's production burden the *Speiser* decision will have forced a conversion of the *oath* system into a *security investigation* program where the refusal to take an oath is at most of only evidentiary significance, insufficient by itself to justify dismissal.

That conversion, of course, is something less than an unalloyed triumph so long as the old security cases remain on the books. Decisions where the state has been permitted to fire an employee as a "security risk" or as "insubordinate" after he had invoked the privilege against self-incrimination in response to questions about Communist party associations are hardly monuments to civil libertarianism; and a movement from the present case law on loyalty oaths to the older disingenuous thinking exemplified by *Beilan*, *Lerner*, and *Nelson* is a consummation devoutly to be avoided.[111]

Even in the context of a security investigation program, moreover, important questions must arise concerning what areas of the employee's private life the state may inquire into, and what substantive standards it may apply in deciding to dismiss. As for the former, the same principles leading the Court to the conclusion that a mere refusal to swear

111. Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 568 (1958); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958).

loyalty can not alone justify automatic dismissal should lead to the conclusion that the state cannot inquire at will into the private beliefs of an employee, as opposed to inquiring into clearly defined factual matters closely related to the conduct of his job.[112]

As for the standards upon which dismissal may be based, last December's decision in *United States v. Robel*[113] does much to undermine all broad-ranging statutes that deal haphazardly with ill-defined security menaces. In *Robel*, which involved a criminal prosecution, the Court invalidated the McCarran Act provisions prohibiting any member of a Communist-action organization to engage in employment in a defense facility; the law's inclusion of passive or inactive members of designated organizations and of non-sensitive positions in the defense industry rendered it overly broad. "The statute quite literally establishes guilt by association alone," wrote the Chief Justice, "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."[114]

In evaluating actual standards for discharge, the Court will face the difficult questions on the permissible scope of statutory language that have plagued it in the loyalty-oath cases. In this sense the functional demise of loyalty-oath systems does not of itself usher in a new day. But by interring loyalty oaths as a self-executing device, the Court can accord proper recognition to the principle that due process forbids the legislature to render a judicial judgment by isolating one group of people on the basis of their application for or receipt of a state benefit such as employment, assuming them all guilty of misconduct, and then punishing them by denying them the benefit if they fail to remove the taint by swearing to an oath. Such an approach has the additional benefit of corresponding with the real objection to fealty systems: their indiscriminate and offensive suggestion of disloyalty, arising solely from an individual's application for a publicly conferred advantage.

112. *Cf.* Spevack v. Klein, 385 U.S. 511, 519-20 (1967) (concurring opinion of Fortas, J.).
113. 389 U.S. 258 (1967).
114. *Id.* at 424.